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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1959

No. 578

CHARLES MANNINA, *Petitioner,*

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, FOOD MACHINERY AND CHEMICAL CORPORATION and CALIFORNIA CASUALTY INDEMNITY EXCHANGE, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI to the Supreme Court of the State of California

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State of California

Charles Mannina, a destitute injured former industrial workman, able to afford the printing of only a skeleton petition herein through the charity of his attorney, on behalf of himself and 7,000,000 other

California workmen deprived of their Constitutional rights under the labor law enforcement machinery set up in California, prays, in this test case, that a writ of certiorari be issued to review the final decision of the Supreme Court of the State of California, refusing to hear or consider his plea for justice.

OPINIONS BELOW.

In the Supreme Court of the State of California in bank

Petition for hearing denied.

Certified as filed Oct. 7, 1959. Gibson
William I. Sullivan, Chief Justice
Clerk

In the District Court of Appeal of the State of California

First Appellate District

Division One

No. 18817

By the Court:

The petition for a writ of review is denied.

Filed September 10, 1959.
Fred B. Wood,
Acting P.J.

Before the Industrial Accident Commission of the State of California

No. 176-821

Decision After Reconsideration

Petition for Reconsideration having been filed and granted in the above-entitled matter, and thereafter the case having been heard by Panel One, in bank, and the record having been again reviewed, this Commission concludes that further proceedings are not essential to the disposition of the claim, and now makes its Decision After Reconsideration as follows:

Findings of Fact

1. Medical treatment has not been unreasonably or willfully delayed or refused applicant so as to warrant imposition of a penalty under Section 5814 of the Labor Code.

Order

Good Cause Appearing Therefor:

It is Ordered that Decision after Reconsideration Granted, filed herein Nov. 25, 1958, be, and the same is, affirmed and adopted as the Commission's Decision After Reconsideration.

Industrial Accident Commission
of the State of California
S. W. MacDonald
John J. Synon
Elton C. Lawless

Filed May 14, 1959.

Before the Industrial Accident Commission of the State of California

No. 176,821

Decision After Reconsideration Granted
(Adopted as Final Decision of I.A.C. under above opinion)

This Commission by order dated February 25, 1958, granted applicant's Petition for Reconsideration, and the matter having been heard on reconsideration before Elvin Connolly, Referee, and resubmitted for decision, this Commission now makes its Findings and Award as follows:

Good Cause Appearing Therefor:

It is Hereby Ordered that Supplemental Findings and Award for Permanent Disability, filed herein on January 10, 1958, be, and the same hereby is, vacated, annulled and set aside, and the following Supplemental Findings and Award be substituted in lieu thereof, and made the Decision after Reconsideration of this Commission.

Findings of Fact

1. Charles Mannina, 42 years, while employed as a welder at San Jose, California, by Food Machinery & Chemical Corporation, whose workmen's compensation insurance carrier was California Casualty Indemnity Exchange, sustained injury on April 19, 1956, arising out of and occurring in the course of his employment.

2. Said injury caused temporary total disability, indemnity for which has all been paid.

3. Said injury also caused permanent disability of 17 percent.

4. Applicant may be in need of further medical treatment to cure or relieve from the effects of the injury herein.

5. Defendants are liable for medico-legal expense incurred by applicant in the sum of $35.00.

6. Defendants are not liable for payment of applicant's self-procured medical treatment obtained from Dr. B. A. Capisi.

7. Applicant's attorney has rendered services of the reasonable value of $235.00, and is entitled to a lien therefor against any compensation now due or to become due.

Award

Award is made in favor of Charles Mannina against California Casualty Indemnity Exchange of permanent disability indemnity in the sum of $35.00 per week for 68 weeks, in the total sum of $2,380.00, beginning October 2, 1957, less credit to defendant carrier for any sums heretofore paid as permanent disability indemnity, and less the sum of $235.00 payable to Foley & Foley, applicant's attorneys.

Award is further made in favor of Charles Mannina against California Casualty Indemnity Exchange of further medical treatment as may be necessary to cure or relieve from the effects of the injury herein.

Award is further made in favor of Charles Mannina against California Casualty Indemnity Exchange of medico-legal expense incurred by applicant in the amount of $35.00 payable to Dr. J. Markham.

It is ordered that this Award shall bear interest pursuant to the provision of Section 5800 of the Labor Code.

F. A. Lawrence
Roland J. Henning
Commissioners

Filed Nov. 25, 1958.

JURISDICTION.

1. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257, which provides in part:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * * * *
>
> (3) By Writ of Certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * *."

2. The following cases, holding that the United States Supreme Court may review a decision of a State Supreme Court construing a state statute by which construction it is contended a party to the proceeding is denied a right guaranteed by the Federal Constitution, sustain the jurisdiction of this Court:

Cudahy Co. v. Parramore, 263 U.S. 418, 44 S. Ct. 366, 68 L.Ed. 366;

Dahn Ke-Walker v. Bondurant, 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239;

Eureka Pipe Line Co. v. Hallanan, 257 U.S. 265, 42 S.Ct. 101, 66 L.Ed. 227;
St. Louis etc. Railway Co. v. Wynne, 224 U.S. 354, 32 S.Ct. 493, 56 L.Ed. 799.

3. The Supreme Court of the State of California is the highest Court of the State.

4. The judgment of which review is sought is a final judgment of the Supreme Court of the State of California.

5. The judgment herein sought to be reviewed was filed on Oct. 7, 1959.

6. The Federal question of substance which is involved is that the guarantee of equal protection of the law and due process of law, as contained in Amendment XIV, Section 1 of the Federal Constitution, has been denied to your Petitioner and 7,000,000 other California workmen who may sustain hidden injuries, such as the head injury he suffered, and who are given but token and unenforceable awards whereas those workmen who sustain injuries visible to the eye are given the complete protection of the Workmen's Compensation Law and of the Constitution of California and the Constitution of the United States.

THE QUESTION PRESENTED.

Has due process of law and the equal protection of the law been denied to your Petitioner and those of the 7,000,000 California workmen who fall into his category of being unfortunate enough to sustain hid-

den or invisible injuries that medical science cannot measure or evaluate because of the impossibility of x-raying or photographing pain?

CONSTITUTIONAL PROVISIONS INVOLVED.

This case presents the question of Petitioner's rights under the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment of the United States Constitution (Amendment XIV, Section 1):

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

STATEMENT.

Your Petitioner was given a token award of 12¾% ($1,785.00) for a very severe industrial injury to his head (struck by a falling 2-inch iron pipe weighted down with 400 lbs. of equipment), which has totally disabled him for over 3½ years at a loss to him in wages of over $17,000.00 and so tortured him with such profound headaches during this period that he has many times been on the verge of committing

suicide, as Geo. E. Boulden of San Mateo did last month because his headache pain was "unbearable". The Commission rating, based almost solely on the unadulterated *GUESSES* of three insurance carrier doctors that his headaches were "slight", was for "Constant slight-to-moderate headaches", the Commission approved report of the Referee pointing out that, "The amount to be awarded as permanent disability for headaches could be increased from the award given in this case depending upon increased symptoms. The increase could be to 100% for pronounced head symptoms".

In spite of numerous proceedings had since then, including a full hearing before the entire Commission panel of three itself at San Francisco (at which a scale physically was brought into a courtroom for the first time in the history of American jurisprudence and the heavy *FACTS* of this case, of severe injury, unconsciousness, hospitalization, loss of revenue, 16 year work record, the applicant's testimony as the only one who *KNOWS* the facts, etc., were weighed against the three bags of wind representing the *GUESSES* of the three insurance company doctors on the left hand side of the scale and the three Commissioners were told plainly what the true situation is in California in this field of hidden industrial injuries), the token award still stands and your Petitioner is up against the *IMPOSSIBLE* proposition of proving his "pronounced head symptoms" that would entitle him to a "100% rating" according to the Commission, by means of the hearsay guesswork

evidence the Commission places almost sole reliance upon when the only real *ACTUAL* or *FACTUAL* evidence that exists is the testimony of the injured worker himself and his sweet mother, dear wife who has slaved to support the family ever since he was thrown onto the industrial scrap heap, and the 14-year-old high school son, all of whom have to watch their loved one (who was their bread winner for 16 solid years at the Respondent employer's plant as a welder before the industrial accident felled him, without one single day off in 16 years for any reason) writhe in pain without even the merciful sleep that cannot be induced without the pain and sleeping pills the three Commissioners gave him with their right hand and ironically then took away with their left.

He was given a further token award of 4¼% ($595.00) for a serious psoriasis condition that developed at the site of his head injury and spread to other parts of his body, with a questionable cure, since psoriasis cannot in 99 cases out of 100 be cured and may break out again at any time, and with evidence of its activity still present on his scalp and with a very plainly visible large cosmetic blemish at the site of injury, which is tender to the touch to the extent that the felled worker cannot wear the helmet that is absolutely required in his work as welder because it increases the skin irritation and the severity of his headaches as well. *Solely* on the *GUESSES* of the insurance company doctors that this psoriasis condition has been arrested by their medical skill, and almost a year's battle, to a point where it can be consid-

ered as permanently cured in spite of active symptoms that flare up on continued pressure, the Commission rated him for a "slight cosmetic defect at site of injury", the Commission-approved Referee's report stating:

> "The 4.14 in the formula was given for skin condition, at which time cosmetic blemish was considered. He (the Commission's rating expert, who rated according to the above-quoted Referee's instructions) considered the ability of the applicant to wear a welder's helmet as this was included within the occupation modification".

The token Indian-giver award for "further medical treatment as may be necessary to cure or relieve from the effects of the injury herein" was completely nullified by the Commission's later Finding of Fact that "medical treatment has not been unreasonably or willfully delayed or refused so as to warrant imposition of a penalty under Section 5814 of the Labor Code" (providing for a 10% penalty in such cases of man's "inhumanity to man", to quote the Legislature's reason for enacting it). This talking out of both corners of the Commission's mouth at the same time has left the insurance carrier free in this case to continue refusing to this day the pain pills and sleeping pills it solemnly promised *two* Referees in open court it would continue to provide and to continue refusing the man *any medical treatment whatsoever* for the entire two years since the last Referee hearing, including the operation he needs to insert a silver plate in the skull at the site of injury to relieve the pressure on his brain that conservative treatment,

or absence of any treatment, has not alleviated. The Commission just closes its eyes to the fact that the injured worker has had to mortgage his home for $2,100.00, borrow $600.00 from his mother and $150.00 from his attorney for pain pills, sleeping pills, expenses of trips from his home in Santa Clara to the University of California Hospital, $100.00 for hospitalization there, delinquent taxes on his home to avoid a foreclosure sale, and school books, clothes and food for his teen-age son as the third victim of the invisible injury the father sustained and of the Commission's impotence in coping with these injuries. In all, he has spent $415.50 for pain and sleeping pills and $1,034.93 for medical attention since the last hearing to alleviate the pain the Commission ordered the carrier to alleviate and the carrier promised to but double-crossed the Commission and the worker and now refuses to, with the "no-penalty" blessing of the Commission as an excuse to hide behind in thus making a mockery of law and order in the great State of California. We are certain that the workers who sustain visible injuries don't get that kind of shocking injustice as an inheritance from the late and revered Hiram Johnson, who fathered this humane statute and who would turn over in his grave if he could but see the kind of justice the workers with hidden or invisible injuries are getting at the hands of the Commission he established to protect them *ALL*, including those with hidden injuries. Since they are getting the kind of injustice that cries to high Heaven, we are fully warranted in appealing to the highest Court of this land to help us now that the machinery

of justice has broken down in California as to this special isolated group of black sheep "step-children", an unwanted segment of our population. Failure of due process and of equal protection our forefathers guaranteed to us are not strong enough words to describe the kind of justice this typical worker with hidden injuries has had, and his fellow workers with similar injuries have had, in the last quarter century of infamy in this regard since California lost its beloved Commissioner, Arthur Pillsbury, whom Hiram Johnson as his first act as Governor chose to put some humanity into this law for the protection of those who toil in California. Surely the Supreme Court of the United States, which prides itself on the motto engraved in enduring marble in front of the edifice that houses it of "*EQUAL* Justice Under Law", can find some way in which to remedy the terrible condition that exists in this regard in the ordinarily progressive State of California. All these Federal constitutional questions were timely raised in the first pleading in the Appellate Court when your Petitioner first learned that the Commission was to oppose his petition in real earnest.

REASONS FOR GRANTING THE WRIT.

The battle for equal justice for the invisibly injured that has culminated in this appeal to our revered high Court has been carried on by your Petitioner's attorney for the past decade and a half that he has practiced law privately after serving for two

decades as Chief Attorney for the California State Labor Commissioner and Deputy State Labor Commissioner under five Governors and six Labor Commissioners and spending seven years at our nation's capital working with a Steering Committee of 150 Congressmen (75 Democrats and 75 Republicans) to bring EQUAL protection in the social security field by extending the basic statute in that field to the one-half of our population that was omitted from its original coverage.

In the 15 year battle for justice for California's invisibly injured workers the most that your Petitioner's attorney has been able to accomplish to alleviate the truly shocking condition that has existed, in which the sacred functions of the Commission have in reality been turned over to the insurance carriers' doctors, has been to secure a dictum, over a decade ago, from Division One of the State Appellate Court to the effect that if the Commission, in deciding these invisible injury cases, went entirely on the guesses of the doctors and refused to consider "*at all*" the testimony of the injured worker, it would have acted "*improperly*" (*Leo Cadotte v. Industrial Accident Commission*, 86 C.A. 2d 754, at 758, 194 P. 2d 563—1948).

This dictum has been interpreted by the Commission as meaning that if it decides these cases, as the triers of the facts, by giving 99% consideration to the guesses and 1% to the facts, this dictum has been complied with and the higher courts of California will both "*AMEN*" their decision, as they have done in

this extreme case, doubtless on the basis of compliance with this "ONE PER CENT RULE".

In thus asserting their "AMEN RULE" in these industrial accident cases, the honorable judges of these courts are, we solemnly contend, violating their oaths of office not only to support the Constitution of the United States with its "DUE PROCESS" and "EQUAL PROTECTION" clauses but also the California laws and its Constitution with its similar clauses (Article XX, Sec. 11—"All laws of a general nature shall have a *uniform* application"; Article XX, Sec. 13—"No *person* shall be deprived of life, liberty or *property* without due process of law") and with its *unique* provision giving *special* protection to *ALL* California workmen injured in industry, which includes those with invisible injuries, reading in part, as follows:

> "The Legislature is hereby expressly vested with plenary power : . . . to *create* and *enforce* a *complete* system of workmen's compensation . . . to compensate *any* and *ALL workmen for injury* or disability . . . sustained in the course of their employment . . . which complete system includes adequate provision for the *comfort, health* and safety and *general welfare* of any and *ALL* workmen *and those dependent upon them for support*, to the extent of relieving from the consequences of *any* injury or death incurred or sustained by workmen in the course of their employment . . . also *full* provision for such *medical*, hospital and other remedial treatment *as is requisite* to *cure* and *relieve* from the *effects* of such injury . . . and full provision for vesting *power, authority*

and *jurisdiction* in an administrative body with *all* the *requisite* governmental functions to determine *any* dispute or matter arising under such legislation, *to the end* that the administration of such legislation shall accomplish *substantial* justice in *ALL* cases *expeditiously, inexpensively,* and *without encumbrance of any character, all of which matters are expressly declared to be the social public policy of this State, binding on ALL departments of the State government".* (Article XX, Sec. 21—1918—with emphasis added.)

The special California statutory mandate we contend is being violated (Labor Code, Section 3202) reads as follows:

> "The provisions of Division 4 and Division 5 of this code *shall* be *liberally construed* by the *courts* with the purpose of extending their benefits for the protection of persons injured in the course of their employment". (Emphasis added.)

The higher Courts of the State of California when they apply the same rule of rigidity to these industrial accident cases in saying "The triers of the facts have spoken" as they do in other cases of, say, appeals from the Superior Courts, are ignoring or blue-penciling this section of the law and permitting justice to be made a mockery of. When they permit the Industrial Accident Commissioners to become the "triers of the guesses" and confess their impotence to remedy the situation in spite of this mandate of the Legislature ("shall" in this case means "must") and in spite of the special Constitutional mandate made binding on it as the judicial "department" of our

government, they are remiss in their duty to protect the workers of California from the miscarriage of justice of the Commission created for the express purpose of protecting them but which evidently considers itself not a "court" and so able to take advantage of the slip-up of the Legislature in not specifically including the "Commission" in its language. The Courts should have said: "You are, in effect, a 'court' and you are, definitely, a 'department' of our California government, in fact, the main department these workers must look to for protection, so you should have construed this act liberally in their favor and not as 'triers of the guesses', thus giving them guesswork or witchcraft justice as a California heritage. You should, moreover, have taken *judicial notice* of the fact that severity of a headache is not a medical question, but one of fact, to be determined just as any other question of fact is determined by the trier of the facts, under the rule laid down in *Varcoe v. Lee*, 180 Cal. 338, 345, 181 Pac. 223 (1919) that 'justice does not require that courts profess to be more ignorant than the rest of mankind.'"

The situation even goes beyond this matter of guesswork the way it operates in California. If has degenerated into an inherently fraudulent system of purchased justice, dependent upon who "gets there firstest with the mostest". For instance, in this case, the insurance carrier was able to purchase the guesses of three doctors who presumably profess occult power to the effect that this man's headaches are mild or slight. When asked how he would meet this situa-

tion, one of the State's most prominent applicant's attorneys said "I would get five opinions (polite word for guesses) to the effect that his headaches are severe or profound". Your Petitioner's attorney, of course, told him that this was an absolute *impossibility*, as a doctor could not be bribed with a thousand dollars to say that his headaches are more than mild when the insurance carrier already had three who had prostituted their profession by guessing for pay that they are "slight" and when there isn't a doctor on the face of this earth, no matter how expert, who can, *in fact*, tell whether a person has a headache and, if so, whether it is mild or severe, any more than he could tell whether a person is hungry; that besides, even if the injured worker wanted to be crooked and try to purchase such impossible guesses (which his attorney would not stoop to trying to get although this is the kind of purchased medical "evidence" the Commission says he *must* have to prove his case for the injured worker), neither the worker nor his attorney has any funds for the required bribery. All the money they can spare, or borrow, is needed for pain pills, sleeping pills and medical attention and living expenses which the Commission has deprived this man of, as a Referee for the Commission has even summarily denied this man a hearing on his claim that his headaches have become worse in the last two years since his last hearing and on his further plea to punish the carrier for its refusal to furnish medical attention under two awards for same that have long since become final as to the carrier, so that, in the absence of relief from this high Court, the sit-

uation bids fair to continue until this man either dies or commits suicide and thus brings the further disgrace of violence that has marked California's progress toward humane conditions for its workers, starting with the Wheatland hop field riots of a half century ago that initiated most of our progressive labor legislation on their behalf, the murder of the Gray brothers by exploited workers that brought our wage laws, the murder of Richard T. Stone on September 27, 1925, by Millan Vukich when your Petitioner's attorney was unable as a public official of the State to collect his wages for him (*People v. Vukich*, 201 Cal. 290, 257 Pac. 46) and the bombing of the residences of Industrial Accident Commission officials at Los Angeles a decade ago when one of these hidden injury workers failed to get any relief from them.

In another case now pending before the Commission panel (*Granville O. Burrow v. California Casualty Indemnity Exchange*, No. 57 S.J. 1445), the carrier kept purchasing the guesses of the doctors that this seriously injured worker had no pain in his back or disability (in spite of scores of leg collapses from a pinched nerve in the back and a positive electromyogram to prove his need for an operation to remedy his condition) until it got to a *sixth* doctor who was the favorite of the Referee, who frankly stated in his order terminating the man's compensation in spite of an empty token award for medical attention that he did so because this doctor "enjoys a reputation for competency in his field and for fairness in *evaluation* of industrial injury and the referee is inclined to *rely* upon *his OPINION*." (Emphasis added.) The hired

tool of one of the litigants thus became the decision writer for the Commission, without benefit of any civil service screening or legal training to grasp the significance of the many-sided situation that should face a Referee interested in the *facts* rather than on whose guess he should rely when the facts become too complicated for him because they are hidden from his view by the very nature of the injury.

This Referee's decision is on a par with that of Presiding Commissioner Ralph E. Mustoe of the Los Angeles panel of a decade ago when he stated in the *J. C. Rhodes v. Industrial Indemnity Co.* case, L.A. 97, 397, S.F. 123-839: "The Independent Medical Examiner having considered your present condition *non-industrial*; the Commission was left with *no alternative* but to deny your Petition for Rehearing". (Emphasis added.) This was a case where a tractor turned over on a perfectly healthy man and the then most rabid insurance company doctor in San Francisco acted as the decision writer for the Commission, just as the Referee's pet doctor did in the above *Burrow* decision based on guesswork and in derogation of all the facts.

In the case of *City and County of San Francisco v. Margaret Cecelia Pollard*, No. 87916, of a decade and a half ago, which was the first hidden injury case handled before the Commission by your Petitioner's attorney, *TEN* of the best neurological, orthopedic and psychiatric experts in San Francisco *guessed*, for pay, that this young nurse's injuries were "all in her mind", "the result of psychosis", "neurosis", "func-

tional disorder", and all the other high sounding phrases these experts use to doll up their guesses, but Dr. Nels Ahrlund of San Jose pulled *two* ruptured discs out of her back and put her back on the job as a nurse within a few months.

The danger of *faking* in these hidden injury cases is *minimal*, the leading insurance carrier attorney for 30 years and the head of the largest industrial carrier in the State *both* estimating that such faking occurs in but 1 out of 20,000 cases. Besides there is an automatic brake against faking, that of pecuniary *loss* by faking, namely, loss of from one-half to two-thirds of one's income, in the instant case some $17,000.00 in the three and a half years the worker has been lying on the scrap heap screaming with pain and without food and clothing as far as our heartless Industrial Accident Commission is concerned and as far as our two rubber-stamping higher Courts are concerned. His only relief can come from the Court that ruled, after almost two centuries of darkness in the human relations field, that justice is not dependent upon the color of one's skin, and that can now make further historical progress in this same field by ruling that justice is not dependent upon the size of a litigant's pocket book or upon the guesswork of the hired tools of one of the litigants.

Such a decision would mark the greatest step forward in the field of humanities since the Court's elimination of the color line in that portion of the jurisprudence field.

Moreover, such a decision would be nation-wide in its scope, since the same terrible condition of guess work justice doubtless prevails in every State in the union. It does in the Federal field of workmen's compensation where the rule is that these hidden injury cases are decided "*entirely*" on the guesses of the insurance-company minded doctors. Your Petitioner's attorney has appealed that ruling of the Deputy Commissioner of the Bureau of Employees' Compensation at San Francisco in the *Naomi Lilly* case of 18 leg collapses and a positive myelogram proving a disc injury, to the Bureau head, the Department head, the President and the Appeals Board of the Bureau at Washington and has been met with the same denial of justice there that has been had for 25 years in California in these hidden injury cases. His next step is an appeal to your Honorable Court for justice on equity and Constitutional grounds, the Federal statute giving no right of appeal to the two and a half million Federal Government employees covered by it and your Honorable Court having ruled decades ago that these employees are second-class citizens with no rights whatever in this field since they are paid by a Federal appropriation which Congress can spend as it sees fit without regard to due process or equal protection, which puts Federal employees practically on a dole and when they sustain visible injuries they are doled out a little extra to feed their families but if they sustain invisible or hidden injuries they are dependent "*entirely*" on the guesses of the insurance-company minded doctors beholden to the industrial carriers for

most of their business, their large cars and their swimming pools, with no right of cross-examination, no right even to a hearing, and no right to a court review of their cases, and so dependent "entirely" on guesswork justice as against the approved State rule in California of 99% guesswork and 1% facts. Your Petitioner's next big project is to take this Naomi Lilly test case for 2½ million Federal employees to your Honorable Court after he finishes his current nationwide petition drive for 5,000,000 signatures to draft Adlai Stevenson for President in an effort to put some humanity in the administration of our Federal laws such as the voters of California decided upon for their State Government in the last election.

These are big projects but your Petitioner's attorney has devoted the last 41 years of his life to fighting for such human rights as are here involved and he will continue to fight for them until he dies, regardless of consequences to himself in the way of loss of needed revenue for his family, borrowed money on insurance policies to pay for this appeal and the printing of this brief and the drudging labor of night work that may wreck his health. He happens to have been forced into a key position of responsibility in all of these matters of prime importance to the nation and he will not shirk this responsibility for personal gain. He just hopes and prays that his appeal to our highest Court (to which he was admitted to practice two decades ago with Hiram Johnson, the father of workmen's compensation in California, as a sponsor) does not fall on deaf ears so as to make his task more for-

midable by forcing him into a five-year battle to attain these same ends of justice before the Legislature of the State of California and the Congress of the United States. Your Honorable Court has the power to achieve these reforms by one stroke of the pen. Will it make that mighty stroke?

CONCLUSION.

Your Petitioner respectfully submits that the Writ of Certiorari should issue to the end that this Court may review the decision of the Supreme Court of California and determine whether that Court, in approving the decisions of the Appellate Court and the Industrial Accident Commission, has deprived Petitioner of rights guaranteed by the Fourteenth Amendment to the Constitution of the United States, reconstruing the provisions of the California Code and California Constitution provisions mentioned above so as to protect the basic rights of your Petitioner and the 7,000,000 other California workmen on whose behalf this appeal is filed.

Dated, San Jose, California,
December 4, 1959.

Respectfully submitted,
ARTHUR L. JOHNSON, of
JOHNSON, THORNE, SPEED & BAMFORD,
Attorneys for Petitioner.

LE COPY

Office Supreme Court, U.S.
FILED
JAN 5 1960
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 578

CHARLES MANNINA, *Petitioner,*

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, FOOD MACHINERY AND CHEMICAL CORPORATION and CALIFORNIA CASUALTY INDEMNITY EXCHANGE, *Respondents*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 578

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Respondent Industrial Accident Commission of the State of California respectfully submits its Brief in Opposition to the Petition for Writ of Certiorari filed by petitioner, Charles Mannina.

OPINIONS BELOW

On May 14, 1959, respondent California Industrial Accident Commission issued its Decision After Reconsideration, ordering that its Decision After Reconsideration of November 25, 1958, be affirmed and adopted as its Decision After Reconsideration.

The Decision After Reconsideration of November 25, 1958, has been set forth in its entirety in the Petition For Writ of Certiorari at pages 4-6. It awarded permanent disability indemnity, medical treatment and reimbursement for medicolégal expenses while denying reimbursement for self-procured medical treatment.

Petitioner thereupon filed his Petition for Writ of Review in the District Court of Appeal of the State of California which was denied without opinion on September 10, 1959. He then filed a Petition for Hearing by the Supreme Court of the State of California, which was denied without opinion on October 7, 1959.

JURISDICTION

The order of the California Supreme Court denying petitioner's application for a hearing was entered on October 7, 1959. The Petition for Writ of Certiorari was filed on December 10, 1959. The jurisdiction of this court is invoked by petitioner under Title 28, United States Code, Section 1257.

Petitioner asserts that he is being denied equal protection of the law and due process of law guaranteed in Amendment XIV of the Constitution of the United States in that he and 7,000,000 California workmen sustaining "hidden injuries" are given "but token and unenforceable awards" as compared to workers sustaining injuries visible to the eye "who are given the complete protection of the Workmen's Compensation Law * * *" (p. 7).

Respondent commission submits that the District Court of Appeal and the Supreme Court of the State of California correctly applied controlling California statutes and case law which, in turn, are not in conflict with the Constitution, the laws of the United States or decisions of this court. It is submitted that petitioner has not shown any federal question to exist and that the case does not, in fact, present any federal question.

THE QUESTION PRESENTED

Have due process of law and equal protection of law been denied petitioner where respondent commission, after due consideration of all the evidence, awarded him permanent disability compensation of 17 percent ($2,380) of total disability rather than 100 percent, or some percentage in excess of 17 percent?

STATEMENT OF THE EVIDENCE

Petitioner has not set forth sufficient facts from which a realistic perspective of the case may be obtained; further, petitioner has set forth, as facts, numerous statements which are not facts in the record but are merely assertions of petitioner unsupported by any evidence in the record. Therefore it is incumbent upon respondent commission to set forth the essential facts in the case.

Petitioner, a welder, born 1913, sustained an industrial injury on April 19, 1956, when a steel pipe struck him on the head. He returned to work several days later and, except for a few days off subsequently,

continued to work for approximately six months, at which time he left work for less than two weeks. He returned to work for several more months until January 16, 1957.

The First Report of Injury diagnosed the injury as a contusion of the hand and scalp and a concussion. No sutures were required and X-rays of the head and back were negative. At the outset, petitioner's symptoms were described by doctors as "far out of proportion to the severity of the injury" with "no objective neurological signs to account for the symptoms" (Report of James W. Markham, M.D., 5-11-56); "cleared neurologically in regard to any underlying brain damage as to cause of his headaches" (Stanley A. Skillicorn, M.D., 9-21-56); "no neurological disorder resulting from the industrial accident under consideration. Some headache may well be occurring on a tension basis. No reason is seen to attribute any psychoneurosis to the accident under consideration." (John M. Harter, M.D., 10-10-56); "(a) complete neurological reevaluation including the cranial nerves, the motor system, the cerebellar system, the sensory system and the reflexes was entirely normal." (Dr. Skillicorn, 1-14-57.)

On January 23, 1957 petitioner filed an application before the commission and a hearing was held on March 18, 1957. He was represented by counsel. Despite some medical evidence that petitioner was not disabled from work (Dr. Harter, 10-10-56), the referee accepted evidence favorable to petitioner and filed his

Findings and Award on April 10, 1957, providing for continuing temporary disability payments, further medical treatment and reimbursement of $84 for the cost of self-procured treatment by his family physician, Dr. Campisi.

Pursuant to the award the carrier thereafter had petitioner examined by O. W. Jones, Jr., M.D., who reported on April 29, 1957 that neurological examination was normal but that a spinal puncture should be done to rule out the possibility of a subdural hematoma. He stated that no therapy was recommended, that petitioner could carry on his regular, routine work and that he "did not think that this patient should be taking narcotics."

The carrier authorized the spinal puncture, which was performed on May 13, 1957. Dr. Jones reported on May 14, 1957, that the test showed a normal spinal fluid pressure and that the fluid was clear. He reported also that he had given petitioner a prescription for some empirin compound to take in the event of headache. Petitioner agreed to return to work. On the basis of Dr. Jones' reports, the carrier filed a request to terminate temporary disability payments. Petitioner objected and a hearing was held on October 10, 1957.

Petitioner testified, among other things, that he was getting pain pills from Dr. Campisi, that the pills which Drs. Skillicorn and Jones had given him also provided relief but that he did not ask them for more pills because he was getting them from Dr. Campisi.

He had tried on several occasions to work but had had to leave because of his headaches.

Dr. Markham reported on October 31, 1957, in a report to Dr. Campisi, that "(t)here are no objective findings to explain his headaches. In my opinion these are on the basis of chronic anxiety tension state, and he should be physically able to return to the work he was doing at the time of his injury. No further tests seem indicated from the neurological standpoint nor any further treatment."

Dr. Jones reported on July 31, 1957, that neurological findings were normal. He classified the headaches (which petitioner described as coming and going, present maybe two or three times a day) as being of a slight type which petitioner could tolerate but which might cause him some handicap in the performance of his duties. Dr. Jones stated that he should be working, that no further treatment or investigation would be of any value and that while the headaches might persist over a period of two or three years, there should be no permanent disability. On October 2, 1957, Dr. Jones substantially repeated his earlier opinion and petitioner again described his headaches as ones which come and go and which he may have two or three times a day.

On January 10, 1958, the referee issued an award of 8½ percent ($1,155) permanent disability. Petitioner sought reconsideration from the commission which was granted and further hearings were held and evidence taken.

In regard to a psoriasis condition affecting petitioner's scalp, George V. Kulchar, M.D., reported on March 25, 1958, that it is a constitutional disease, frequently hereditary, and while its presence at the site of the trauma may have been caused by the trauma, its occurrence elsewhere was not due to the injury. He stated that "regardless of the injury psoriasis would have appeared on the scalp and elsewhere."

Hearing was held on April 1, 1958, at which Dr. Kulchar testified that a few X-ray treatments would cure the scalp lesions and that any outbreaks involving the scalp were not connected with the industrial injury. William N. Enright, M.D., testified for petitioner to the effect that the injury could have caused the psoriasis. The carrier agreed to institute treatment for the psoriasis and the matter was placed off calendar. On May 20, 1958, Dr. Kulchar stated that petitioner had recovered from the scalp condition so that treatment would be terminated. On July 1, 1958, Dr. Kulchar reported that any reoccurrence and progression of the psoriasis are unrelated to his injury of April 19, 1957.

Hearing was held on July 10, 1958, at which Dr. Kulchar testified that any outbreaks of psoriasis would not be connected with the injury. Petitioner testified, among other things, that he had severe headaches two or three times a day and that he had not worked recently because of them.

The commission requested a recommended rating from its Permanent Disability Rating Bureau on the basis of constant slight to moderate headaches and slight cosmetic defect at the site of injury. The recommended rating was 17% ($2389), an increase of 8% over the prior rating. The 17% rating included 12½% for the headaches and 4½% for the cosmetic defect. Petitioner requested cross-examination of the rating specialist, which was held on October 31, 1958.

Decision After Reconsideration was filed on November 25, 1958 by the commission, awarding permanent disability of 17%, further medical treatment and reimbursement for medical-legal expenses incurred by petitioner. Reimbursement for self-procured treatment by Dr. Campisi was denied.

On December 15, 1958 petitioner substituted present counsel in place of former counsel and filed a Petition for Reconsideration of the November 25, 1958 decision. He charged substantially that which he charges herein.

On February 11, 1959 reconsideration was granted by the commission and the case was restored to the calendar for oral argument on the issues of permanent disability and self-procured medical treatment. Hearing was held on March 23, 1959, at which discussion and oral argument were had. Petitioner raised an additional issue of 10% penalty for unreasonable delay or refusal to furnish medical treatment (California *Labor Code Section 5814*). At the conclusion of oral argument the commission offered to counsel for pet-

given the opportunity to select a medical examiner of his choice to examine petitioner without cost to him. The offer was refused by petitioner's counsel.

Decision After Reconsideration was filed on May 14, 1959, finding that medical treatment had not been unreasonably or wilfully delayed or refused petitioner so as to warrant imposition of a penalty and it was ordered that the Decision After Reconsideration of November 25, 1958 be affirmed and adopted as the Decision After Reconsideration. Petitioner then sought relief in the higher courts.

ARGUMENT AND AUTHORITIES

I. California Statutes and Case Law Have Been Correctly Applied and Are Not in Conflict With the Constitution, Laws of the United States or Decisions of This Court.

Respondent commission submits that there has been no violation of the constitutional requirements of due process of law and equal protection of the laws. As shown by the statement of facts, petitioner was given numerous hearings and was permitted a full and complete opportunity to present his evidence. Both procedurally and substantively, petitioner was accorded due process of law. Controlling California statutes and case law were applied to the case and are applied uniformly to all cases of injury "hidden" or otherwise. Accordingly, petitioner was not deprived of equal protection of the laws. Findings of the commission were ones of fact, made after due consideration of all the evidence, and were based upon substantial

evidence rather than "guesses." Thus there would appear to be no federal question presented by this case.

Petitioner has, however, made sweeping accusations and charges against respondent commission of such a nature that the commission wishes to present sufficient argument to dispel any misapprehensions regarding its handling of the case. As a result, its argument will include some points which were made in the State's appellate courts and which are, perhaps, more appropriate there than in this court.

(A) APPLICABLE STATUTORY LAW AND CASE LAW SHOULD BE CONSIDERED IN AN ANALYSIS OF THE ISSUE OF EXTENT OF PERMANENT DISABILITY.

Petitioner has not informed this court of California statutory law and case law which are applicable to the instant case and which provide the necessary tools by which the problem may be properly analyzed.

California *Labor Code Section 4660* regarding permanent disability states in relevant part:

> "(a) In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his age at the time of such injury, consideration being given to the diminished ability of such injured employee to compete in an open labor market.
>
> "(b) The commission may prepare, adopt, and from time to time amend, a schedule for the determination of the percentage of permanent disabilities in accordance with this section. Such schedule shall be available for public inspection, and with

out formal introduction in evidence shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule."

As stated by the Court in *Vincent v. Ind. Acc. Com.*, 136 Cal. App. 2d 679 at page 684 (1955), in a case remarkably close to the problem in the instant case, "the determination referred to in subsection (a) of Labor Code, section 4660, will of necessity be arbitrary to a degree, and no one can determine with nicety exactly how much an injured employee should receive for the permanent loss, or loss of use, of a particular member of his body. This is illustrated by the provisions of section 4662 which provide that except as to certain enumerated cases, the determination and extent of permanent disability shall be determined by the commission 'in accordance with the fact.'"

The important factors in any permanent disability are impairment of earning capacity and diminished ability to compete in the open labor market. Pain, per se, is not ratable except insofar as it causes impairment of earning capacity and diminished ability to compete in the open labor market. (*Campbell on Workmen's Compensation*, Vol. 1, pp. 340-341, 341).

It is stated in Campbell, Volume 1, at pp. 340-341:

"Pain is subjective. Its degree varies with the individual. Some persons have an unusual obliviousness to pain, while others are hypersensitive. For this reason its evaluation is always difficult and, to a certain extent, conjectural."

"Since compensation is not designed to recompense for mere physical pain and suffering, the fact that such be present is not alone sufficient to warrant disability indemnity. Pain must be present to a degree to be disabling in fact. Usually, where it is present to this degree, there are objective symptoms to substantiate the complaint. . . . If these attendant and corroborative elements be not present, too much weight should not be given to the unsupported statement of the injured as to the existence of pain to a disabling degree. The probity of the injured should be scrutinized. The entire social, moral and mental background should be considered.

"For purposes of permanent disability rating, allowance for pain must be made rather arbitrarily. * * * In the ratings pain alone rarely exists since, if really present, attendant weakness and loss of function also exist."

It is a well-established rule of California law that the extent of permanent disability is a *question of fact* to be determined by the commission. The Supreme Court stated in the case of *Frankfort Gen. Ins. Co. v. Pillsbury*, 173 Cal. 56, at page 59:

"The extent of disability occasioned by an injury is not capable of exact measurement. The percentage of such disability is a matter to be determined by the commission in the exercise of its sound discretion, based upon a fair view of all of the circumstances. *Its conclusion on this matter is the determination of a question of fact* and is not subject to review by the courts unless palpably

contrary to the undisputed evidence." (Emphasis added.)

In the case of *Lib. Mut. Ins. Co. v. Ind. Acc. Com. and Scrafin*, 33 Cal. 2d 89, the Supreme Court stated at pages 93-94:

> "It is the province of the commission to resolve conflicts in the evidence. * * * Arriving at a decision on the exact degree of disability is a difficult task under the most favorable circumstances. It necessarily involves some measure of conjecture and compromise by the finder of fact as certainly would occur in the mental processes of a so-called expert witness. When the commission is confronted with widely divergent views as to the extent of the loss of function of the body, further complicated by the possibility of lack of cooperation or faking, in various degrees by the injured person, it may make a determination within the range of the evidence as to the degree of disability. Applicable here is the rule followed in other cases where the trier of fact does not adopt exactly the view of any expert witness as to value. The trier of fact may accept the evidence of any one expert or choose a figure between them based on all of the evidence."

(B) A DETERMINATION OF THE EXTENT OF PERMANENT DISABILITY RESTS ON MANY FACTORS, ONLY ONE OF WHICH IS THE INTENSITY OR DEGREE OF PAIN. PETITIONER'S COMPLAINT OF HEADACHES AS BEING SEVERE DOES NOT COMPEL THE COMMISSION TO APPLY AUTOMATICALLY THE SCHEDULE RATING OF 60% FOR SEVERE HEADACHES OR 100% FOR PRONOUNCED HEADACHES.

Petitioner's argument appears to rest, in part, on the premise that where an employee describes his headaches as severe the commission is bound by the

employee's characterization and must apply thereto the schedule rating of 100%, for pronounced headaches, or at least 60%, for severe headaches.

The weakness of the argument may be seen, first, from the fact that headaches which occur many times a day, lasting for several hours, severe in intensity, are more disabling than headaches which are severe in intensity but occur only once or twice a day, lasting for a more limited time. The former disability would be entitled to a much greater permanent disability rating than the latter.

A second weakness in the argument is in the subjective nature of the complaint of severe headaches. A person may describe his headaches as "severe" who has one every other day, lasting for 30 minutes, severe in degree, while another person having the same problem might characterize his difficulty as mild rather than severe. It would appear to be unrealistic, then, to compel the commission, as the trier of fact, to accept without question the employee's characterization of his difficulty and to apply automatically the schedule rating for severe or pronounced headaches. The intensity of pain may very well be severe but intensity is only one factor in a determination of the extent of permanent disability caused by an industrial injury.

Respondent commission submits that it is *not* compelled to apply the schedule rating of 100%, or 60%, to this case. The schedule is based upon numerous factors. Such factors include frequency of headaches, their duration, the degree (intensity) of pain, the type

of activity bringing on the headaches, the extent of interference with work, the kind of work which can be performed, the presence of any accompanying symptoms such as fatigue or impairment of concentration, the effect of medication in controlling the headaches, ability to compete in the open labor market, and other such factors.

These factors must be taken into account in a determination of whether the permanent disability produced by the headaches is minimal, slight, severe or pronounced. The schedule rating is prima facie evidence of the percentage of permanent disability to be attributed to the industrial injury. (*Labor Code, Section 4660(b).*) However, characterization of the headaches to which a schedule rating is applied is, in the instant case, in the discretion of the commission to be determined from the facts of the case. A rating is then requested from the Permanent Disability Rating Bureau to be made on the basis of the instructions of the trial referee or the commission panel. The resulting rating is a *recommended* rating only. (*Title 8, Calif. Adminis. Code, Art. 20, Sec. 10926.*)

In the instant case the commission determined from the facts that the character of the headaches for purposes of rating the permanent disability was *slight to moderate*. The schedule rating is 5% for the former category and 15% for the latter. The recommended rating for the headaches was 12% after adjustment (for age and occupation) of the selected standard rating of 10%. The complaint of the employee that the

headaches were severe could not require a rating of 100%, for pronounced headaches or 60%, for severe headaches.

(C) THE PREVAILING RULE IN CALIFORNIA IS THAT THE COMMISSION MAY WEIGH TESTIMONY OF MEDICAL WITNESSES AGAINST TESTIMONY OF THE EMPLOYEE REGARDING EXISTENCE AND DEGREE (INTENSITY) OF PAIN. THEREFORE, THIS CASE DOES NOT INVOLVE THE WEIGHING OF "FACTS AGAINST GUESSES".

Even if the commission were to assume for the sake of argument that the employee's characterization of his headaches as severe requires application of the schedule rating for severe or pronounced headaches, the question would still remain of whether the commission *must* accept the employee's characterization of his pain over that of expert medical witnesses. According to petitioner, the opinions of the latter on the subject are mere guesses and cannot produce a conflict with the employee's testimony concerning the severity of his pain.

Respondent commission submits that case law specifically establishes the sound rule of law that the commission is entitled to weigh the testimony of medical witnesses against that of the employee as to *pain* and as to disability, and that the commission is correctly permitted to accept the testimony of the medical witnesses over that of the employee if it so chooses after due consideration.

Said rule of law is set forth in the very case cited by petitioner on the subject of expert testimony versus the injured employee's testimony as to pain and dis-

ability, and it was counsel for petitioner who represented the employee in that case. The case is *Cadotte v. Ind. Acc. Com.*, 86 Cal. App. 2d 754, in which the employee was *unsuccessful* in his attempt to annul the commission's decision. It is true that the court stated that the commission cannot refuse to consider the testimony of the employee as to pain and disability. However, the court also stated at page 758 the rule upon which the case turned, and it is that rule which would appear to control in the instant case:

> "We cannot say as a matter of law that the commission must accept the testimony of petitioner as to pain and disability as against that of a medical man, or vice versa. The testimony of each must be considered by the commission and the conflict must be resolved by it. When that is done, this court may not interfere."

In the *Cadotte* case the commission had denied the employee *any* award of compensation for permanent disability. The petitioner had sustained an industrial injury to his foot and ankle for which he received medical treatment, including an operation. The employee claimed permanent disability consisting of a weak and painful ankle as well as injury to the sole of his foot. The court stated at pp. 757-8:

> "Petitioner contends that he was deprived of due process of law because the commission refused to weigh or consider his own testimony as to pain and disability, and, in fact, completely disregarded it. There is nothing in the record to support this contention."

At page 759 the court, in what constitutes a direct answer to petitioner's position herein, stated that "petitioner's contention is that a petitioner's testimony as to subjective symptoms must be accepted as against contrary medical opinion. Such, of course, is not the law. It is for the commission to decide where there is a conflict, which to believe."

Further authority for respondent commission's assertion that it may adopt the opinions of medical experts concerning subjective complaints over the testimony of the injured employee is found in 2 *Hanna, The Law of Employee Injuries and Workmen's Compensation*, p. 260, wherein it is stated:

> "The principal complaint in almost every type of subjective condition is that of pain or discomfort in varying degrees and locations. Determination of the existence and extent of factors of discomfort is one of the most difficult of a referee's responsibilities, since his judgment as to the presence or absence of exaggeration, conscious or unconscious, may make a difference of many percent and thousands of dollars to the parties, when translated into terms of disability rating factors upon which permanent disability indemnity will ultimately be paid. *The Commission is not bound, however, to accept the employee's testimony as to subjective symptoms as against contrary medical opinion.*" (Emphasis added.)

Respondent commission submits then that there is substantial evidence to support the finding of permanent disability as to the headaches. The evidence shows that the employee sustained an industrial injury on

April 19, 1956, which caused a contusion of the scalp and a concussion. No sutures were required and the injury was such that the employee was able to return to work several days thereafter. Then, except for a few more days off subsequently, he continued to work for approximately six months. He was then off work for less than two weeks and returned to work for several more months until January of the following year. For long intervals after the injury the employee was completely free of the headaches. (Report of Dr. Skillicorn, dated September 21, 1956.) No doctors found any objective evidence of disability and all diagnostic tests, including x-rays, electro-encephalogram, and spinal puncture have been negative. Likewise, numerous evaluations and re-evaluations by medical experts of the cranial nerves, the motor system, the cerebellar system, the sensory system and the reflexes have been normal. The doctors could find no basis to support the subjective complaint of headaches. One doctor, Harter, put them on a tension basis but did not attribute the tension to the instant injury. He stated that there was no traumatic neurosis as a result of the injury and that he saw no reason to attribute any psychoneurosis to the injury.

The doctors have stated that the employee can do his regular work and that he has no permanent disability as the result of his injury. (Report of Dr. Jones dated October 2, 1957, p. 2, and report of Dr. Markham dated October 31, 1957). Dr. Jones describes the headaches as being of a slight type which might

cause some handicap in the performance of his duties. Said reports are the most recent in the record on the complaint of headaches. Despite the strong evidence in the medical reports of no permanent disability as the result of the industrial injury, the commission chose to believe that the injury had caused headaches of a slight to moderate degree insofar as permanent disability from work was concerned. The evidence might have supported a denial of any permanent disability. In any event, the commission determined the extent of permanent disability on the basis of all the evidence. It also awarded compensation to the employee for all time lost from work between the date of injury and October 2, 1957, at which time the disability became permanent and stationary.

California *Labor Code Section 5953* states, in relevant part:

> "The findings and conclusions of the commission on questions of fact are conclusive and final and are not subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission."

The California court, in the case of *State Employees' Retirement System* v. *Ind. Acc. Com.*, 97 Cal. App. 2d 380, 382, stated:

> "In reviewing the evidence we are not permitted to substitute our views for those of the commission and annual an award unless there is no substantial evidence to support the findings and order. (Citation) On the contrary, we are required to indulge all reasonable inferences which may be drawn

legitimately from the facts in order to support the findings of the commission, and in doing so all that is required is reasonable probability; not absolute certainty. (Citations) It is the duty of a reviewing court to search the record to discover whether the evidence is reasonably susceptible of the inferences drawn by the commission in support of its conclusion, and upon favorable discovery to affirm the award. (Citation.)"

In *Douglas Aircraft, Inc.* v. *Ind. Acc. Com.*, 47 Cal. 2d 903, 905, the California Supreme Court stated:

"When a finding of fact of the Industrial Accident Commission is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact.

"The findings of the Commission are not subject to review on this ground except insofar as they may have been made without any evidence whatever in their support."

II. Respondent Commission Correctly Determined That Petitioner Was Not Entitled to Reimbursement for Costs of Certain Self-procured Medical Treatment.

It is difficult to discern from the petition if petitioner is raising a federal question regarding refusal of the respondent commission to order reimbursement for costs of self-procured medical treatment. However, respondent commission believes that its position should be made known to this court again to counteract any

misapprehension which might be derived from petitioner's sweeping attack.

Pursuant to the April 10, 1957 award of further treatment, the insurance carrier reimbursed petitioner for his costs of treatment, assumed medical control and had him examined by Dr. Jones. It was at Dr. Jones' request that the carrier furnished the spinal puncture. The test was negative and Dr. Jones prescribed empirin compound for the headaches, the cost of which was paid by the carrier. Dr. Jones knew of no therapy or investigation that would be of any value. He stated that petitioner should not have narcotics.

A report to Dr. Campisi by Dr. Markham also stated that no tests or treatment were indicated and that petitioner could return to the work he was doing at the time of his injury.

The evidence indicates that petitioner then, without advising the employer or carrier, went on his own to a doctor (Campisi), other than the one furnished by the carrier, thus depriving the carrier of its right to medical control. California *Labor Code Section 4600* provides that medical, surgical, and hospital treatment "reasonably required" shall be provided by the employer. It provides further that "In the case of his neglect or refusal seasonably to do so, the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment."

Respondent Commission submits that the employer did not "neglect or refuse seasonably" to provide

treatment "reasonably required" by the injury. The employee admitted at the hearing on October 10, 1957 that the pills prescribed by Dr. Campisi gave temporary relief only, that the pills given to him by Drs. Jones and Skillicorn also gave him temporary relief and that the reason he did not ask them for more pills was because he was getting them from Dr. Campisi. The referee stated, significantly, that the defendants were providing observation and were willing to supply the employee with palliative treatment, but that the employee went to Dr. Campisi on his own and secured palliative treatment which was no more effective than that of defendants' doctors and resulted in no overall improvement of his condition. The referee felt that under the circumstances there had been no neglect or refusal to provide necessary treatment and that, therefore, the self-procured treatment should not be paid by the defendants. (Report of Referee, January 10, 1958). That award was ultimately set aside by the commission when it doubled the permanent disability rating and ordered future medical treatment furnished where the referee had denied further treatment. However the commission denied reimbursement for the self-procured treatment.

The following statement of the court in *San Indem. Co.* v. *Ind. Acc. Com. & McKinney*, 85 Cal. App. 2d 171 at pp. 178-9, is appropriate:

> "It is apparent also that her main reason, expressed more than once, for seeing another doctor, was that she did not feel that the insurance company's doctors were helping her. The situation here

did not justify her going to a doctor of her own choosing without further either contacting Dr. Dresel's office or the carrier and requesting that another doctor be provided. If she was dissatisfied, as the evidence discloses she was, she was not entitled to employ a doctor until she had first given the employer or his carrier the opportunity of providing further care."

The court in the *McKinney* case also quoted with approval, at page 180, from a leading text as follows:

"Schneider on Workmen's Compensation Law, volume 11, 2d edition, section 491, page 1626, states: 'When the employee abandons the medical and hospital service supplied by the employer, and secures other treatment of his own choice, he does so at his own risk, and cannot have the expense of the service of his own choice allowed against the employer or insurer unless he can satisfy the commission that the service supplied by the employer was inadequate or inefficient to an extent that justified the employee in abandoning it.'"

It should be noted that petitioner did not produce any report by Dr. Campisi concerning the nature of the treatment the doctor rendered, what the treatment was for, what the diagnosis is, the prognosis, or anything from which new light might be shed on the medical aspect of the case. Petitioner testified that the injections given by Dr. Campisi were to increase the blood circulation. Without a report or testimony by the doctor, the reason for the injections and their connection, if any, with the injury are unknown. Dr. Campisi is the employee's family doctor and might be

treating him for conditions unconnected with the injury.

Moreover, *Labor Code Section 4601* provides for a change of physicians if the employee so requests. Under that section the employer must offer to the employee a panel of at least three additional practicing physicians competent to treat the particular case. There is no evidence of the employee's having requested a change of doctors in the instant case.

Petitioner has been awarded further treatment and under workmen's compensation law the employer is entitled to direct that treatment. *(Labor Code Section 4600)* If the employee is dissatisfied with the doctors furnished by the carrier, he can request a change of doctors. *(Labor Code Section 4601)* If he still is dissatisfied with the treatment ordered, he can get treatment on his own and produce evidence that the self-procured treatment was different than that furnished by the defendants and that it was reasonably required by the injury. *(Labor Code Section 4600)* Petitioner chose not to produce *any* evidence other than his own testimony. The commission offered to have the employee examined by an independent medical examiner at the commission's expense. Petitioner refused substantially on the grounds that an independent medical examiner would be "insurance minded" and that, in any event, there is no room for medical evidence. According to petitioner the case was simply one in which he is entitled to a permanent disability rating of 100%, and lifetime treatment by doctors chosen by himself.

such benefits being warranted on the basis of his testimony that he has severe headaches and that his own doctor is treating him.

Respondent commission points out that petitioner is not prevented by California law from doing just what he is doing—directing his own medical treatment *at his own expense*. If he wishes such expenses to be the responsibility of the employer, he should secure, from the Legislature, a change in the workmen's compensation laws. Until such legislative change occurs or until petitioner can show that the employer has neglected or refused seasonably to provide treatment reasonably required by the injury, reimbursement should be denied. The evidence in the record does not, at this time, compel or warrant a contrary finding.

In connection with petitioner's argument that the defendants agreed to pay certain costs of self-procured treatment, the Referee's Report of the hearing on October 10, 1957 states that the defendants agreed to pay the employee's *accrued* drug bills. Said bills were paid and there is nothing to show an agreement to pay any other bills.

Petitioner's reference at page 11 of his petition to the need for an operation to insert a silver plate in his skull is a reference to medical evidence obtained by him and submitted to the commission only recently and well after the instant decision under attack was rendered. Said evidence is part of a new proceeding instituted by petitioner before the commission, w[illegible]s pending at this time.

III. Petitioner's Numerous Additional Charges Are Without Support in the Record.

Petitioner makes many additional charges and accusations. Respondent commission submits that an examination of the facts, together with application of relevant statutes and case law to those facts, indicates that the charges are without support. His contention that the commission regards itself as not being a court and, therefore, not governed by the mandate of liberal construction contained in *Labor Code Section 3202** is unsupported by any evidence whatever. It is a bare allegation without more. The commission has the status of a court (*Western Mut. Supply Co.* v. *Pillsbury*, 172 Cal. 407; *1 Hanna, The Law of Employee Injuries and Workmen's Compensation*, p. 86) and is bound by the rule of liberal construction.

Petitioner's contention that respondent commission is denying complete protection of the workmen's compensation laws and the Constitution to workers suffering "hidden injuries" while affording complete protection thereunder to workers suffering "visible injuries" is unsupported by the evidence in the particular case and is not borne out by past cases. Respondent commission considers each case on its merits, receiving into the record all relevant, material and competent evidence upon which, as the trier of the facts, it makes its findings. Whether the injury in question is external

* "The provisions of Division 4 and Division 5 of this code shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment."

or internal, visible or invisible, hidden or otherwise, the question for resolution is still one of fact where the evidence is in dispute. A physician's medical opinion regarding the intensity of pain suffered by a claimant is as much a reliable fact to be weighed in the determination as is the claimant's estimate of it. The expert's opinion is based upon objective and subjective findings which, in turn, are evaluated by the physician on the basis of his knowledge of medicine and his experience and observations in previous cases of a similar nature. Application of the expert's knowledge, experience and skill to the problem at hand (intensity of pain) would appear to provide as sound a basis for decision as the testimony of the claimant."

If the California appellate courts and respondent California commission are correct in their position that the question is one properly within the realm of expert evidence as well as lay evidence, petitioner's assertions regarding "guesses" would seem to be without merit. Further, respondent commission applies this rule to *all* injuries, not just to "hidden injuries." To deny the competency of an expert's testimony is to assert that the commission is bound to accept a claimant's characterization of his pain, except insofar as his credibility may be questioned. Under petitioner's view, results of scientific inquiry would be incompetent and would raise no conflict. Respondent commission submits that such an approach does not afford a sound and realistic basis for solution of the problem. The preferable approach is to receive both lay and expert

evidence applicable to the problem, to weigh that evidence in its entirety and to resolve any conflict therein. The conclusion or inference thus drawn has a fair and substantial basis.

The validity of the many catch phrases used by petitioner, such as "guesswork justice", "ONE PER CENT RULE", "AMEN RULE", "triers of the guesses", "witchcraft justice" and others must be determined by analysis of the facts and application thereto of controlling statutory law and case law. Respondent commission submits that said phrases, upon analysis, have no application to the instant case or to other cases before the commission.

CONCLUSION

Respondent commission submits that there has been no violation of the constitutional requirements of due process or equal protection of the laws. Petitioner was given numerous hearings and full opportunity to present his evidence. Both procedural and substantive due process of law were accorded to him. Controlling state statutes and case law were correctly applied and are of uniform application. Findings of fact were made after due consideration of all the evidence and were based on substantial evidence as required by state statutes. The appellate courts therefore did not disturb the findings.

Respondent commission submits that, for the reasons set out above, the Petition for Writ of Certiorari should be denied.

Dated, San Francisco, California, December 31, 1959.

Respectfully submitted,

EVERETT A. CORTEN
Attorney for Respondent
Industrial Accident Commission
of the State of California

MELVIN S. WITT,
of Counsel

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1959

No. 578

CHARLES MANNINA,
Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, FOOD MACHINERY AND CHEMICAL CORPORATION and CALIFORNIA CASUALTY INDEMNITY EXCHANGE,
Respondents.

REPLY BRIEF OF PETITIONER.

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BARNARD-WALSH PRINTING CO., SAN FRANCISCO

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REPLY BRIEF OF PETITIONER.

Under the provisions of Rule 24, Subdivision 4, lest silence be construed as giving consent and in order to set the record straight, Petitioner respectfully submits this Reply Brief to the Brief for Respondent in Opposition to Petition for Writ of Certiorari.

RESPONDENT'S BRIEF PIN-POINTS PROBLEM.

The Brief filed by the Respondent Commission pin points the entire problem presented to this high Court. It sets forth in minute legal detail the ground rules under which the Industrial Accident Commission of the State of California has operated for the last quarter century, as far as hidden or invisible injuries (such as headaches, backaches or bursitis of one's bread-and-butter arm), are concerned. The Court, therefore, has the full picture from both sides.

Viewing the picture as presented by the Respondent Commission, the Court will note that there is just one thing missing from that picture—JUSTICE, and if it lacks justice, it lacks everything. As *Kant* put it: *"If justice should perish, man's existence on earth would have lost its meaning"*.

We, the Petitioner and his attorney, and the 7,000,000 California workmen on whose behalf they are fighting for justice, feel that, after a quarter of a century of stepped-up injustice in this field (ever since the Commission lost the original concept of fifty years ago, of the founders of workmen's compensation in California, that "a postal card to the Commission will bring justice to ANY injured worker"—a concept which seems to have ceased with the death of Commissioner Arthur Pillsbury, who originally laid down the ground rules for the guidance of the Commissioners and hearing Referees), the time has come to "call a spade a spade" and to try to get back to fundamentals as far as possible.

On page 28 of its Brief, the Commission boasts of a "*sound* and *realistic* basis for solution of the problem". This does not necessarily mean a "*just*" basis, the Court will note, or one which shows any charity or concern for the welfare of the 7,000,000 workmen entrusted to the Commission's care with *specific instructions* from the Legislature (page 16 of Petition) and from the People (pages 16 and 17 of Petition) to see to it, *affirmatively*, that ALL injured workmen get REAL justice, not the *negative* approach of having to be *pressured* to give even PAPER justice, which was bemoaned two thousand years ago by *Paul* (the Apostle of the Christ who taught us that love or compassion for our fellow men is the greatest force actuating mankind as distinguished from the beasts of the jungle, who devour each other) when he said, "Though I speak with the tongues of men and of angels, and have not charity" (synonymous with "love to our neighbor", according to all Bible concordances), "I am become as sounding brass or a tinkling cymbal". (*I Corinthians* 13, 1).

A VIEW OF THE COMMISSION'S "SOUND AND REALISTIC" APPROACH.

Let us, therefore, view the negative tinkling cymbal approach to justice which the Commission offers in its Brief to those workmen with hidden injuries, including your Petitioner, a justice in which all the cards in the so-called "sound and realistic basis" are stacked against the invisibly injured worker, as is evident from the following:

1. Under the system in vogue, as so delineated, the sacred functions of the Commission are, in practical effect, turned over to the insurance company doctors. They became the Commission's "*experts*" and "*evaluati*" (page 28 of Commission's Brief) the "objective and subjective findings" on the basis of their "knowledge of medicine and experience and observations in previous cases of a similar nature" (page 28). This "evaluation" is, *by law*, made the duty of the Referee as a public servant, not the hired tool of one of the litigants, whose "experience" and "observations" may be warped, not only by the guesswork involved in evaluating the subjective complaints, but by erroneous or inadequate facts, misunderstood expressions of the patient, preconceived prejudices, or even such human considerations as reluctance to antagonize the insurance carriers responsible for their large cars and swimming pools. A public servant has none of these outside considerations to sway him and he gets the injured worker's story *under oath* at the hearing and can watch his demeanor and study his reactions on the stand, especially under cross-examination or examination in explanation of moving pictures the carriers usually bring in where faking is suspected, pry into his work habits before injury and his *actual* loss of earnings because of the injury (a man earning $90.00 per week steadily, for instance, isn't likely to fake an injury to get his wages cut one-third to $30.00), whether he is borrowing money to live on, how he gets his pain pills, food for his family and house or rent payments, exactly how he got hurt and symptoms since, and can call for additional in-

formation if any phase of the facts is inadequately developed, even to welcoming the testimony of the injured man's wife and close associates as to his condition before and after injury.

Instead of this probing into the facts with an open mind to find a JUST basis for a decision that may decide the fate of the worker and his family for a decade or more, what do we find under the Commission's "sound and realistic" approach? Before the *Leo Cadotte* decision which your Petitioner's attorney obtained in 1948 (Petition page 14; Commission's brief pages 17 and 18) the general rule was: "We don't need the Applicant's testimony, as we have two or three medical reports that give us the entire picture". When Petitioner's attorney first questioned this procedure with a plain statement that "the injured worker ALONE, in these hidden injury cases, knows whether he is disabled and in pain, that the doctors aren't gods, have no occult or supernatural power to x-ray or photograph pain and so are just guessing and they know it", he was recommended by the Referee for a citation for "contumacious conduct because of his intemperate remark about the doctors". This remark is just as true today as it was twelve years ago and the attorney repeats it in this Brief to the highest Court in the land in full confidence that he won't be cited for contumacious conduct for stating this truth, which has risen again, though partially crushed to earth when a dictum only was obtained from the Appellate Court (Petition, pages 14 and 15) to the effect that there must be at least ONE PER-

CENT consideration given to the injured worker's personal testimony as against the guesses of the doctors.

This dictum of twelve years ago remains the law in California today. We seek to overturn it by a positive declaration from this high Court to the effect that it will take JUDICIAL NOTICE of the fact, *known to all mankind*, that truth is truth, that an unadulterated guess by a medical man as to something about which it is PHYSICALLY IMPOSSIBLE for him to know is just *an unadulterated guess* and thus not the *substantial* or *legal* evidence which the *law requires as a basis for sustaining a decision*.

It was the plain duty of the three insurance company doctors who ventured guesses that the worker's headaches in the instant case were "mild" or "slight" to have said in their reports: "It is PHYSICALLY IMPOSSIBLE for us to determine whether this man's headaches are mild, moderate, severe or profound, as we can't see the inside of his head, any more than we can see the inside of his stomach to ascertain if he is hungry. We cannot, therefore, in all honesty, give you an opinion or guess as to this. That would be usurping the function of a Referee, who must determine this from all the pertinent facts in the case to be brought out, under oath, in a hearing before him".

It was the affirmative misconduct of these three doctors in making the guesses they did that caused all the trouble in this case. The offense of a doctor who guessed that the man's headaches were "severe" or "profound" would be just as great, as he shouldn't be

guessing AT ALL when it is physically impossible for him to have any more basis for such a guess than any ordinary layman. We, therefore, plead with this high Court to face up with the *realities* of the situation and give the Commission a "sound and *realistic* basis" for deciding these cases, to wit, on the facts and not on guesses, which the Courts, and the Commission, must take judicial notice are something not within the realm of medical science to determine so do not constitute substantial or legal evidence. The matter should, therefore, be remanded to the Commission for further proceedings minus such illegal evidence.

2. That the Commission does not now operate on any such basis and, in effect, openly advocates guess work justice is made clear by its flat declaration (Brief, page 28) as follows: "Application of the expert's knowledge, experience and skill to the problem at hand *(intensity of pain)* would appear to provide *as sound a basis for decision* as the testimony of the claimant". Are the Justices of this high Court to go along with this specious reasoning when each one knows down deep in his heart and all the recesses of his brain that the injured worker alone, in these hidden injury cases, is the *only one* who ACTUALLY knows whether or not he has pain and that a doctor's guess as to the severity or intensity of the pain is, *at most*, only a GUESS?

Answer to this simple question is the crux of this entire case. If the answer is "yes", the Petition will, of course, be denied. If the answer is "no", a Writ will doubtless issue so that this subject may be more

fully explored, with the object in view of ultimately remanding the entire case to the Commission for proceedings that will give us justice not based on guesswork but based on more substantial evidence, the law and Constitutional guarantees.

3. The Commission further narrows the issue in this case by calling the Court's attention twice to the refusal of the tendered "independent medical examiner examination at the Commission's expense" (Brief, pages 8 and 9 and page 25). This was done deliberately to raise the issue herein presented, and have it determined, once and for all, as to the validity of guesswork or witchcraft justice. For fifteen years, Petitioner's attorney had been seeking just such a case where the Commission wanted to turn its sacred function of determining the severity of a headache over to an insurance company doctor for decision. The best test case he had been able to get previously was the *Cadotte* case referred to above, in which the Appellate Court of California ruled that the facts did not clearly establish that the Commission had gone *entirely* on the guesses of the doctors as against the facts but in a dictum indicated that *if it had*, it would have acted "*improperly*" (Petition, page 14). He felt that the Commission might, on the basis of this dictum, change its procedure and practices to the extent of going more on the facts than the guesses but soon learned that it was to continue its practice, at the all-important Referee level, of almost sole reliance, in these hidden injury cases, on the guesses of the doctors and that the Referees were to consider the dictum

as requiring only that they put the injured worker on the stand to get some superficial facts from him to protect the record while going *almost* solely on the guesses of the doctors. Then, one year later, came the declaration of the Chairman of the Los Angeles Panel (Petition, page 20) that the Commission had "NO ALTERNATIVE" but to rubber-stamp the ruling of the so-called "Independent Medical Examiner" (an expert so skilled in "evaluating" hidden injuries for many years as to be dependent on the industrial carriers for perhaps 80% of his business). The most was made of this flat Commission level declaration in case after case, before the Referees, the Commission and the Courts, but no out and out declaration was available to Petitioner's attorney of "RELIANCE" on the doctor's "OPINION" until the currently pending *Burrow* case arose (Petition, page 19). Consequently, when one of the Commissioners (who had just been appointed by the Governor and was thus not familiar with all this background of fifteen years of struggle against such substitution of an insurance company doctor for the Commissioners as the judge in the current case) suggested such a reference in this head injury case where there wasn't the slightest possibility of anything but a "guess" as to the severity of a headache, the Petitioner's attorney turned down the offer, as indicated in the Commission's Brief (pages 8 and 9 and 25), on the two grounds of (1) there being no such a person available as an "Independent Medical Examiner", for any expert in this field in San Francisco who practices more than a few years soon be-

comes beholden to the insurance carriers for much of his business and so, of course, when it comes to *pure guessing*, as was necessarily the case here, would naturally tend to guess the way his bread was buttered and (2) a "*guess is a guess*" no matter from what source and that what we needed to get real justice in this field was less, *not more*, "guess work".

This deliberate and calculated stand of your Petitioner's attorney in culminated protest to the established procedure and practices in this field is now before the bar of this high Court for adjudication. Was it right or was it wrong? Do we want justice based on facts or on guesses? Will we sanction the Commission continuing its now, in its Brief (page 28), openly admitted philosophy tending to make the Commissioners the "*triers of the guesses*" instead of the "*triers of the facts*" and encouraging its Referees to violate their Constitutional duties by doing likewise? Do we want "*averaged*" justice as here, where the Commission added its usual 5% for "subjective complaints" to the doctors' guesses of "slight" to make the rating "slight to moderate" as a sop to the injured worker and to salve their consciences just in case the doctors' guesses they rubber-stamp are wrong and injustice has been done by this guesswork system? Or do we want the **EXACT** justice the law requires and each case warrants on its own merits and on its own facts? The decision on these questions is now in the lap of the Justices of this Honorable Court and we pray that it will be favorable to the millions of workers who will suffer grave injustices in the future, along with your

Petitioner, if a "Writ Denied" decision issues, since it may be another fifteen years before such strong facts as we find here for a test case arise and an attorney is found who will donate his time and money to make an issue of the matter in the cause of abstract justice.

"COMMON SENSE" APPROACH OUTLINED.

In order that the Court may be in a position to offer to the Commission a really sound, realistic, practical, down-to-earth and common sense basis for deciding these hidden injury cases as against the Commission's theory and practice of deifying the doctors and letting them decide such cases for them, we offer here a further elaboration of the controlling California cases on the doctrine of JUDICIAL NOTICE, which, if used by the Commission and its Referees more and more, would simplify all their work in this field and give to the victims of these injuries the "*expeditious*" and "*inexpensive*", "*due process of law*" and "*equal*" JUSTICE *guaranteed* them by their flouted Federal and State Constitutions (Petition, pages 8, 15 and 16). Good common "*horse sense*" would then prevail at hearings and on appeals and reconsiderations in place of the present system of insisting on proof by medical reports, which means that the injured worker has to go before the Commission with a doctor on one side and an attorney on the other, and then not get justice in these hidden injury cases as distinguished from the visibly injured cases, since he doesn't have the money to purchase "*Impossible*" medical guess after medical guess, as the insurance carrier that collects premiums

from his employer to *protect* him has, and he can ill afford to give an attorney a slice of the small compensation needed to feed his family.

Such judicial notice would solve many Referee problems if taken of such elementary things as that no doctor on the face of the earth is in a position to gauge the severity of a headache, that the worker who hadn't had a day off for illness or disability for fifteen years prior to injury is presumed to be disabled by the injury in question under the governing case law which says that "industry takes a workman as it finds him" and "no disability from prior disease or trauma before the injury, none after", that a man with continual shooting pains down his leg or who has numerous leg collapses such as occur in around 15% (estimate of the late Dr. Ralph Ghormley, uniformly recognized as America's leading orthopedic expert after his 30 years in charge of such cases at the Mayo Clinic) of ruptured intervertebral disc cases from partially and intermittently paralyzed leg muscles stemming from nerve root involvement in his back, is in need of further medical treatments and a possible operation for removal of the offending disc if conservative treatment such as traction does not cure him. Instead, the practice has been for the Referee, even though he may have *actual* knowledge over a long period of years of such common occurrences and experiences and which have been written up time and time again in national magazines and newspapers so as to become *general knowledge*, to say, in effect: "Those are medical problems too deep for me to

fathom so if you don't have a *doctor's report* showing these things and connecting them up with the injury I'll have to throw you onto the industrial scrap heap without the operation and even without pain pills to relieve your pain pending the operation you say you need but don't have a doctor's report to prove, even though you have to watch your family starve in the process".

The cases on the doctrine of *judicial notice* which would stop all this and put some humanity back into the enforcement of this basic law for the protection of those who toil and establish the *rule of reason* that *"if the facts, plus what I can take judicial knowledge of, outweigh the guesses, the guesses go out the window"*, are as follows:

Varcoe v. Lee, 180 Cal. 338, 345; 181 Pac. 223 (1919), in which the California Supreme Court ruled as follows:

> "It may be stated generally with regard to the question as to what matters are properly of judicial cognizance that, while the power of judicial notice is to be exercised with caution, courts should take notice of whatever *is or ought to be generally known*, within the limits of their jurisdiction, *for justice does not require that courts profess to be more ignorant than the rest of mankind*. . . . The fact that the *belief is not universal, however, is not controlling, for there is scarcely any belief that is accepted by everyone*. . . . In every instance the test is whether sufficient notoriety attaches to the fact involved as to make it safe and proper to assume its existence without proof. In harmony with that view it has been said

that courts *must 'judicially recognize whatever has the requisite certainty and notoriety in every field of knowledge, in every walk of practical life'*". (Emphasis added.)

Markulics v. Maico Co., Inc., 74 C.A. 2d 66, 69; 168 Pac. 2d 35 (1946), in which the California Appellate Court stated:

> "*Judges cannot pretend to be ignorant of what is within the knowledge of most men of their jurisdictions*". (Emphasis added.)

In re Lawrence, 55 C.A. 2d 491, 497; 131 Pac. 2d 27 (1942), in which the California Appellate Court ruled:

> "*Knowledge that is generally possessed is the subject of judicial cognizance, and the courts will not shut their eyes and ears to the every-day happenings of contemporary life.*" (Emphasis added.)

A. E. Bell Corp. v. Bell View Oil Syndicate, 24 C.A. 2d 587, 597; 76 Pac. 2d 167 (1938), in which the California Appellate Court stated:

> "*Courts may also take judicial notice of matters of science and common knowledge and of the physical and economic laws governing oil and gas production*". (Emphasis added.)

Benton v. Industrial Accident Commission, 74 Cal. App. 411, 415; 240 Pac. 1021 (1925), in which the California Appellate Court held:

> "Then, too, the *Commission* may judicially notice its former decisions in the same case.

(*Sewell v. Price*, 164 Cal. 265, 273; *Harron v. Harron*, 128 Cal. 303, 305.)

"*Judicial notice is based upon convenience and expediency.*

"To take judicial notice and apply it to the decision of a case is a right which appertains to *every* court of justice, *from the lowest to the highest.* The application of the doctrine of judicial notice is not confined to courts of record. *Certain boards and special tribunals,* which are not strictly courts but which partake of their nature and the findings of which partake of the nature of judgments, *may take judicial notice of certain matters.* (23 *Cor. Jur.*, p. 172; *Anderson v. Board of Dental Examiners*, 27 Cal. App. 336; 149 Pac. 1006)". (Emphasis added.)

Harrison v. Harter, 129 Cal. App. 22, 27; 18 Pac. 2d 436 (1933), in which the *California Appellate Court* ruled:

"*Common experience*, of which *we* MUST take knowledge, teaches us that practically every automobile uses gasoline as a propelling power". (Emphasis added.)

MINOR ISSUES CLARIFIED.

So much for the main issue in this case. The minor factors may be answered succinctly as follows:

1. The failure of the Commission to rate the Petitioner for the latent and still partially present psoriasis condition, *as such*, constituted, in Petitioner's opinion, failure of due process of law in that the Commission should have taken JUDICIAL NOTICE of

the fact, known to the rest of mankind, that psoriasis which begins at the *site* of the injury and spreads *from there*, all over the body is of industrial causation and that a *questionable* cure (since psoriasis cannot in 99 cases out of 100 be cured completely and permanently and, once caused by the injury and activated into the blood stream thereby, may break out again at any time) should be ratable to at least a certain extent, especially when combined with the factor that the necessary wearing of a welder's helmet in the Petitioner's work causes a flare-up of the disease and is very apt to do so for the remainder of his life if he is ever cured of his profound headaches so as to enable him to go back to work at any time in the future, the operation for the cure of which headaches by inserting a silver plate in his skull at the site of the injury being in probable danger of reactivating the disease so as to more closely tie it into a package deal, making his return to productive labor even more problematical.

2. The doctrine of ESTOPPEL is overlooked entirely in the Commission's argument that there is no failure of due process or legerdemain of some sort to grant lifetime medical attention to the Petitioner on April 10, 1957, and again on November 25, 1958, and then deprive him of it by refusing, May 14, 1959, to assess the statutory penalty for continual refusal, *over a period of a year and a half*, to provide any medical treatment or medication whatever when the Commission's own records showed that on January 10, 1958, the Referee stated in his report: "The carrier agreed to pay and presumably has paid appli-

cant's drug bills", none of which have been paid since November 16, 1957, although photostatic copies of the bills from that date to March 28, 1958, were sent in to the carrier and a continuing notice that the "applicant is *still* being treated by Dr. Campisi for his head condition", was sent to the Commission and the carrier in an "Objection to Cessation of Temporary Disability Payments" by Petitioner's then attorney on June 12, 1957. From that day to this, *a period of two years and seven months,* there has not even been a postal card notice to the Petitioner from the carrier that he was no longer under the care of Dr. Campisi, tacitly and affirmatively recognized by *both* the carrier and the Commission as the attending physician on April 10, 1957, when the Commission ordered him paid $84.00 by the carrier and the carrier complied, in addition to promising two Referees to continue paying for the pain pills this doctor prescribed then breaking its promises.

The Commission spends two pages in its Brief (pages 23 and 24) setting forth the law giving the carrier the right to control medical payments. We have no quarrel with that law, but we do say that unless a carrier affirmatively discontinues the doctor recognized as assigned to the case by Commission order and sends the injured worker to a new one, he remains on it and that there is a failure of due process of law to make an *ex post facto* order taking him off the case by Commission decree after the services are rendered and without any notice from the carrier or the Commission that he is no longer on the case.

Since the date of that *ex post facto* order, January 10, 1958, the Petitioner has literally been screaming at the carrier and the Commission for medical treatment and medication to ease his pain pending a requested operation on his brain but deaf ears have been turned to him and even his formal petition for further relief along this line, filed October 9, 1959, was met with summary refusal as *res judicata* by the Referee, with reconsideration granted by the Commission for further study of the issues involved.

CONCLUSION.

It may be that the Commission may reopen the whole issue and right the terrible wrongs done to your Petitioner of its own accord when it realizes the full extent of the guesswork or witchcraft justice accorded him, but your Petitioner is not compelled to wait for, or take a chance on this. If he has proved failure of due process of law and equal protection of the law as to his brain injury, his psoriasis condition or his denial of medical attention that was granted and then taken away by an *ex post facto* order, he is entitled to a Writ of Certiorari against the Commission through the Courts here in California that denied him relief and he humbly prays that such relief will be granted and that it will be broad enough to include within its purview relief for his fellow workers in California and, by way of precedent, 70,000,000 throughout the nation, who may fall victims of the

same system of justice not based on the conception that right makes might.

Dated, San Jose, California,
January 7, 1960.

Respectfully submitted,

ARTHUR L. JOHNSON, of
JOHNSON, THORNE, SPEED & BAMFORD,
Attorney for Petitioner.

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FILED
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1959

No. 578

CHARLES MANNINA,
Petitioner,
vs.
INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, FOOD MACHINERY AND CHEMICAL CORPORATION and CALIFORNIA CASUALTY INDEMNITY EXCHANGE,
Respondents.

PETITION FOR A REHEARING.

ARTHUR L. JOHNSON, of
JOHNSON, THORNE, SPEED & BAMFORD,
181 N. 1st Street, San Jose 12, California,
Attorney for Petitioner.

In the Supreme Court
OF THE
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OCTOBER TERM, 1959

No. 578

CHARLES MANNINA, *Petitioner,*

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, FOOD MACHINERY AND CHEMICAL CORPORATION and CALIFORNIA CASUALTY INDEMNITY EXCHANGE, *Respondents.*

PETITION FOR A REHEARING.

Pursuant to Rule 58, Paragraph 2, your Petitioner herewith files this Petition for Rehearing of the Court's decision of January 18, 1960, denying his petition for certiorari. Signed certificate of counsel to the effect that it is presented in good faith and not for purposes of delay and is restricted to the grounds specified is attached.

RESTRICTED TO MATERIAL IN SUPPLEMENTAL BRIEF.

It is, moreover, restricted to the material in the attached Supplemental Brief of Petitioner, which arrived in Washington too late for the Court's consideration before its decision and was returned by the Clerk. It is incorporated herein, as if here set forth in full, as the Petitioner's Petition for Rehearing.

PRAYER.

WHEREFORE, your Petitioner prays that the Court grant this Petition for Rehearing and or that the situation

be in some manner clarified for the benefit of counsel, who is in doubt whether the Petition for Certiorari was denied on technical grounds of some kind or whether the Honorable Justices of this Court really believe that it is physically possible for a doctor, or any other human being, to gauge the severity of a headache so as to raise this bar to the operation of the doctrine of *judicial notice*, failure to apply which has resulted in a decision based almost solely on guesswork, which is not substantial evidence and thus a denial of due process of law and the equal protection of the law to this invisibly injured worker as against a worker whose injury is plain to see and who suffers no such indignity as Constitution flouting.

Counsel asks this for his future guidance, since if the denial of the petition was on technical grounds only and not on the basis that doctors do have such supernatural powers, he intends to pursue the matter further even if he has to build a case from the ground up, with objection at every level, to every detail which the Court feels was not complied with in this test case. He also intends to bring in the case of the Federal worker, Naomi Laly (Page 22 of Petition), who sustained a hidden injury and was deprived of Constitutional guarantees but who would have no chance of relief if this Honorable Court really feels that doctors can x-ray or photograph pain. This counsel refuses to believe unless the Court says so directly and in plain language, for so long as there is any hope whatever for relief for the potential 70,000,000 sufferers in this regard, counsel will keep trying even if it takes him years to find the proper test cases since this ideal one seems to have failed him for some unknown reason. Will not the Court enlighten him as to this in the interest of justice and the well-being of the laboring population of America?

Dated, San Jose, California,
February 8, 1960.

Respectfully submitted,
ARTHUR L. JOHNSON, of
JOHNSON, THORNE, SPEED & BAMFORD,
Attorneys for Petitioner.

In the Supreme Court of the United States
October Term, 1950—No. 578
CHARLES MANNINA vs. INDUSTRIAL ACCIDENT COMMISSION, et al.
CERTIFICATE OF COUNSEL AS TO GOOD FAITH, ETC.

Counsel for Petitioner hereby certifies that the attached Petition for Rehearing is presented in good faith and not for delay and is restricted to the intervening circumstances of substantial or controlling effect as set forth in the said petition and other substantial grounds not previously presented, as set forth therein.

Counsel realized that certain deficiencies existed in his Petition for Certiorari and Reply Brief in this very important test case which deficiencies he felt important enough to call to the Court's attention, such as the omission of the concrete example of the doctor who actually testified in Court from both sides of his mouth at the same time on this subject of hidden injuries, thus proving *conclusively* that their "opinions" as to them are pure, unadulterated *guesses* and thus not substantial evidence. Your Petitioner forgot this glaring example of guesswork justice and how it operates in California in his previous presentations and, in his humble opinion, it is *controlling*. He also felt that the intervening attempted suicide of one of the victims of "guesswork" justice in California, driven almost insane by pain and suffering and denied relief by the Industrial Accident Commission on grounds as flimsy as mere, *guesswork* opinions warranted calling this to the Court's attention as an example of what happens when justice fails. Hence, his Supplemental Brief, which arrived too late for decision but not for Petition for Rehearing so is hereby presented again as such.

ARTHUR L. JOHNSON of
JOHNSON, THORNE, SPEED & BAMFORD,
Attorneys for Petitioner.

(Appendix Follows.)

Office-Supreme Court, U.S.
FILED
JAN 20 1960
JAMES R. BROWNING, Clerk

Appendix

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1959

No. 578

CHARLES MANNINA,

Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, FOOD MACHINERY AND CHEMICAL CORPORATION and CALIFORNIA CASUALTY INDEMNITY EXCHANGE,

Respondents.

SUPPLEMENTAL BRIEF OF PETITIONER.

ARTHUR L. JOHNSON, of
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[illegible]
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1959

No. 578

CHARLES MANNINA,
Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, FOOD MACHINERY AND CHEMICAL CORPORATION and CALIFORNIA CASUALTY INDEMNITY EXCHANGE,
Respondents.

SUPPLEMENTAL BRIEF OF PETITIONER.

Since supplemental as well as reply briefs are permitted under Rule 24 and Petitioner's attorney deeming this one essential in this case of such great importance to the common people of America, it is hereby submitted.

It is prompted by two developments.

"DUE PROCESS" AS DEPENDENT UPON FACTS.

First of all, on reading in last night's Santa Clara Journal a feature story about the highest Court in our land interesting itself in the alleged "shuffle dance" of Sam Thompson, an elderly Negro, whose right to "due process", in a case where Kentucky law does not permit appeals on such trivial matters as to whether moving one's feet a few inches constitutes "loitering", seems to be dependent upon the *FACTS*, and remembering that Hiram Johnson once said that "*The facts, the inexorable facts, govern every situation*", and further realizing that were this case being argued orally before this high Court one of the learned Justice's might well inquire of Petitioner's attorney: "Is it an actual *fact* that doctors in California indulge in *guesses* in these hidden injury cases or aren't you over-dramatizing the situation?", let me cite to the Court an incident that actually happened in a Superior Court in a northern California county a few years ago when a very prominent orthopedic expert was on the stand in a jury trial of a hidden injury non-industrial accident case.

The good doctor, who is typical of his profession in California in that most "experts" naturally tend to color their "opinions" or "expert testimony" (high sounding words for guesses) in favor of whoever is paying for their services as such, had just finished testifying that the hidden injury victim had, in his considered opinion, no pain, and no disability and was perfectly able to work, when the plaintiff's attorney, on cross-examination, handed him a photostatic copy

of a "report" he had sent to him on the erroneous assumption that he had requested it rather than the insurance carrier's attorney and which he had returned to the doctor after photostating it, in which the doctor had stated just the opposite opinion to that just given in his sworn testimony, and asked him: "Doctor, do you have one opinion you give to the plaintiff's counsel and another exactly opposite opinion that you give to the defendants' counsel on the same state of facts?" The embarrassed doctor thought for a long time and then answered: "You know, I've often wondered about that myself".

In industrial accident cases, where the rights of the worker and his family are almost entirely dependent on such expert "opinions", "reports" or "guesses", when hidden injuries strike them, this situation is magnified a thousandfold and there is no way of exposing this vicious system of purchased justice which has crept into the judicial processes of the Industrial Accident Commission as "standard procedure" in the last quarter century since the workers lost the great guardian of their rights, Arthur Pillsbury, Governor Hiram Johnson's original appointee charged with organizing the Commission fifty years ago in such a simple manner that such injustices based on guesses would be rare.

INJUSTICES NOW COMMON.

Now that the Industrial Accident Commission of the State of California has firmly adopted this guess-

work system of deciding cases, and actually lauds it (Respondent's Brief, p. 28) as *"as sound a basis for decision"* as the testimony of the only person in the whole world that actually *KNOWS* the *facts*, injustices are bound to be common, every-day occurrences under it. They have been in California for the last decade and a half to the personal knowledge of your Petitioner's attorney, who, as the attorney for the 107 unions in the Santa Clara County Building Trades Council and Central Labor Council and most of their members for almost a decade, handled most of the industrial accident cases in the county and whose firm still handles much of this practice. In the Federal field, before the United States Bureau of Employees' Compensation, which supposedly guards the rights of 2½ million Federal employees, the rule is to rely *ONE HUNDRED PER CENT* on the guesses of the doctors and the injured worker isn't even allowed to testify as to the *FACTS*. The California *"NINETY-NINE PER CENT GUESSWORK RULE"* which satisfies the higher Courts of this State (under an Appellate Court dictum which the Commission considers to be the law in derogation of the State and Federal Constitutions, as brought out in our Petition) is doubtless followed in the other 49 States of the Union, human nature being what it is and this issue of guesswork justice never having been raised before in America, so far as is known, except when your Petitioner's attorney raised it before the United States Bureau of Employees' Compensation, its Director, its Department head, the President and the Bureau's Appeals Board in the *Naomi Lilly* case.

(Petition, p. 22), unsuccessfully except for one vote on the Appeals Board. It can, therefore, readily be seen that the rights of all of America's 70,000,000 workmen, any of whom may any day be felled by hidden industrial injuries, may well be involved in this appeal to the revered highest Court in the land on a question so simple as the one here presented as to whether the Court can take judicial notice that there isn't a person on the face of this earth who can gauge the severity of a headache.

FURTHER TRAGIC HISTORY AVERTED.

The second development that has necessitated this Supplemental Brief is the attempted suicide on January 12, 1960, of one of the victims of this vicious guesswork system, *Granville O. Burrow*, whose case is discussed on page 19 of the Petition herein and page 9 of the Reply Brief of Petitioner, and in which the referee stated frankly that he "*RELIED*" on the "*OPINION*" of one insurance company doctor in whom he had confidence in throwing the invisibly injured worker onto the industrial scrap heap as of July 8th of last year. There he has lain ever since, writhing in pain until he could stand it no longer, and, with his right leg growing numb and motionless, told his wife "This is it, honey, I can't take any more". When she returned from work as his substitute breadwinner she found him unconscious from an overdose of APC with Codeine, plus other tranquilizers he had found; and rushed him to the Sonoma County Hos-

pital at 3:30 o'clock in the morning. There he lies still begging for an operation to remove a ruptured disc in his back that four out of the six insurance company's paid examiners *GUESSED* he doesn't need but which an expert at Palo Alto *PROVED* by a *positive* electromyogram he does need badly after fifteen months of disability and conservative treatment. Pain pills he can't get from the carrier so he has to chisel them wherever he can and an operation they won't give him because the referee's pet doctor has *GUESSED* that there is nothing wrong with him, because in looking at him he can't see it. All the poor man has is an empty purse that used to contain weekly wages of $145.00 to support his family and an empty award for "medical attention" that he can't enforce. Is this *JUSTICE?*

Fortunately for the carrier and for the Commission the man didn't die from his suicide attempt. Had it been successful, it would have been blazoned forth on the front pages of every newspaper in the State, just as was the bombing of the residences of Industrial Accident Commission officials at Los Angeles a decade ago when one of these hidden injury workers failed to get relief from them, and California's bloody history that has marked the rise to human dignity of those who toil, as brought out on page 19 of the Petition filed herein, would have had another chapter written, not in blood, as were the other chapters, but nevertheless on the cold marble slab of the morgue that claimed the other victims of California's barbaric practices which are now a thing of the forgotten past.

for which justice no longer hangs her head in shame since the conditions have been remedied by an enlightened people.

THE HEAD OF JUSTICE STILL DROOPS.

The head of justice still droops, however, in this one field of hidden injuries, as no move to remedy the vicious system in vogue has been made by any responsible public official except for one Commissioner, Alexander Watchman, who died fighting against a system he saw eating out the lives of the invisibly injured workmen before him but which one man could not lick. It will take the ruling of this Court of Last Resort to do so, as no other power in this nation has the grasp of things that affect the every day lives of the people that the high Court has which has become lovingly known as the *"COMMON MAN'S COURT OF JUSTICE"*. It is there that his rights are protected on a down-to-earth basis, such as skin pigmentation and "shuffle dance" loitering. The learned Justices there do not dwell in an ivory tower and breathe the rarified atmosphere of precedent and of so-called "sound and realistic" systems that fail to give the one thing to be desired, namely, *JUSTICE*. They meet out *justice* in *equal* measure to the poor and to the rich and they concern themselves with such seemingly trivial matters as color, realities of factual situations and down-to-earth approaches to problems. Can they not see the need for such an approach in this case, where the issue is

so simple as a fact within the cognizance of everyone that the *severity of a headache cannot be measured by ANYONE?* We sincerely hope and pray that the Honorable Justices hearing this appeal will see this simple *FACT* and *forever do away with GUESS-WORK JUSTICE in America.*

Dated, San Jose, California,
January 14, 1960.

Respectfully submitted,
ARTHUR L. JOHNSON, of
JOHNSON, THORNE, SPEED & BAMFORD,
Attorney for Petitioner.